

The following article was published in
SEN Magazine
the UK's leading magazine for special educational needs



For a **FREE** trial copy of SEN Magazine,
[click here](#)

SEN Magazine Ltd. Chapel House, Shawbridge Street, Clitheroe, BB7 1LY
Tel: 01200 409800 Fax: 01200 409809 Email: subscribe@senmagazine.co.uk
www.senmagazine.co.uk

Making sense of SEN law

Douglas Silas looks at how the current SEN legal system operates and questions the wisdom of introducing proposed Government changes

Common sense and the law do not always go together. This sentence may seem blindingly obvious to some and mischievous to others, yet I often have to remind myself, and others, of this simple fact. On the whole, our current SEN framework is not that bad. Indeed, some would go so far as to say that it is the best system in the world. I realise, though, that some people reading this article, who have had to struggle to get their child appropriate provision, may feel that this is not the case.

Although I am a lawyer, I try to avoid litigation wherever possible. I genuinely believe that we can do this sometimes

by just using a bit of common sense. My primary focus is, as I would hope everyone's would be, on the needs of the child. We should always try to resolve matters of dispute between parents, schools and local authorities (LAs) as early as possible, both to ensure the right provision/placement for the child and also to ensure that healthy relationships are maintained, whenever possible, between the parents, school and LA.

Vital statistics

The Department for Education (DfE) issued a statistical release on 23 June 2010 entitled *Special Educational Needs*

Parents approach tribunals to get a fair, independent and objective hearing

in England: January 2010 which stated, amongst other things, that:

- in January 2010 some 220,890 (or 2.7 per cent of) pupils across all schools in England had statements of SEN, the same percentage as the previous year
- the percentage of pupils with statements of SEN placed



in mainstream schools (including nursery, primary, secondary, academies and city technology colleges) was 54.9 per cent (compared to 55.6 per cent in 2009)

- the corresponding figure for the proportion of pupils with statements of SEN placed in maintained special schools was 38.1 per cent, with 4.3 per cent in independent schools, two per cent in non-maintained special schools and 0.8 per cent in pupil referral units
- there were some 1,470,900 pupils with SEN but without statements, representing 18.2 per cent of pupils across all schools. This is an increase of 0.4 per cent from 2009
- the incidence of pupils with SEN both with and without statements is greater in state funded secondary schools (two per cent and 19.7 per cent respectively) than in maintained primary schools (1.4 per cent and 18.5 per cent respectively).

Special Educational Needs and Disability Tribunal

Under the current SEN framework (statementing), if parents are not happy with the SEN provision on offer or if it is clear that the child requires additional or different provision to that which the school can provide, but the LA does not agree with them, they can appeal to the Special Educational Needs and Disability (SEND) Tribunal. Parents approach tribunals to get a fair, independent and objective hearing; they want to feel that the tribunal will at least listen to their side of the story before reaching any decision.

Parents can appeal against a refusal to conduct a statutory assessment/

Parents are legally represented in only nine per cent of SEND tribunal hearings

reassessment, refusal to make a statement after an assessment/reassessment or against the contents of parts 2 and/or 3 and/or 4 of any finalised/amended statement. All appeals must be brought within two months of being sent the decision. There is also a right of appeal against a refusal by an LA to change the name of a school on a statement (provided the statement is at least one year old and the parents are appealing for the same type of school) or a decision to cease to maintain a statement. There is also, since 1 September 2010, a new right to appeal against the contents of parts 2 and/or 3 and/or 4 of a statement by parents following a refusal to amend the statement after an annual review, again within two months of being sent the decision.

According to the SEND Tribunal's Annual Report for 2009-2010, the majority of appeals brought against LAs were for refusals to assess (36 per cent), followed by appeals against the contents of a whole statement (31 per cent) or various parts of a statement (11 per cent for parts 2 and 3 and 12 per cent for part 4). There were also a small number of appeals against refusals to make a statement (six per cent), decisions to cease to maintain statements (two per cent) and refusals to reassess (one per cent). There were no appeals against refusals to change the name of a school in 2009-2010.

The main types of SEN that the appeals concern are autism (26 per cent), specific learning difficulties (16 per

cent), behavioural, social and emotional difficulties (16 per cent), moderate learning difficulties (13 per cent) and speech, language & communication needs (ten per cent). Physical disabilities, severe learning difficulties, hearing and visual impairments and profound and multiple learning difficulties (together with "others/unknown") make up the remainder.

The proportion of registered appeals relating to boys was 71 per cent and girls 29 per cent (the same as in previous years) with 3280 appeals registered but only 707 decisions needing to be issued (including strikeouts), and with an appeal taking on average 6.2 months (down from 6.4 months in the previous year).

Contrary to popular belief, parents are legally represented in only nine per cent of SEND tribunal hearings (down from 18 per cent the year before). Other representatives, for example those from organisations such as Independent Parents for Special Educational Advice (IPSEA), provide 11 per cent of representation (down from 18 per cent the year before). LAs were only legally represented in ten per cent of hearings (down from 15 per cent the year before). 17 per cent of parents had a legal representative through the appeal process (down from 18 per cent the previous year) and seven per cent had a voluntary representative through the appeal process (up from six per cent the previous year).

Are cases getting more complicated?

I would like to think that I have got better at what I do over time, but I have noticed that many cases are getting more complicated in recent years. There is more case law to have regard to, a greater number of difficult issues to resolve and a wider range of

>>

potential consequences to consider when reaching decisions.

Whenever I come out of a tribunal appeal hearing, I am very concerned that parents or LA officers are expected to present cases without the assistance of a legally qualified representative. I specialise exclusively in this area of SEN and even I find it hard to keep up with what is going on sometimes. I know that many LA officers also struggle, and this may explain why LAs do not get it right all of the time. However, leaving it up to a tribunal panel or judge to always know clearly what the law is may not always be the answer. It is important to remember that the law can be interpreted in many different ways.

SEN Green Paper

The prevailing socio-economic and political climates also provide crucial contexts for the law. Last year's change of political direction led to the austerity cuts which have affected us all, either directly or indirectly. In March this year, the Coalition Government also published its long awaited and much anticipated SEN Green Paper. The official press release was entitled "Government proposes biggest reforms to special educational needs in 30 years". With the new Green Paper, major reforms have been proposed to many of the SEN procedures which we have come to know (but not necessarily love), including, notably, the plan, to abolish statements and replace them with a single statutory assessment process and education, health and care plans from birth to age 25. The Green Paper says that by 2014, all children who currently have statements will be entitled to this single assessment and plan. The plan would be clear about who is responsible across education, health and social care for which services. The

way the child is supported would evolve over time, including their preparation for adulthood/employment.

Whether or not the proposals in the Green Paper actually make it onto the statute book, though, remains to be seen. I am all for making the SEN system less complicated but I think that we also have to be very careful about how we go about things and not in one fell swoop get rid of all the legal rights and protections that we have all (both LA and parents) struggled to have legislated for and brought about by case law during the past 30 years. We always need to remember the child/young person at the heart of the process. It seems obvious but sometimes, with all the focus on policies, rights, funding and the law, the child is very easy to forget.

Although there are a number of things that can be rightly criticised about the current framework, I am not sure that now is the right time to try and undertake a wholesale reform of it, bearing in mind the current economic situation. Making targeted changes to things that are objectively shown to be not working may be a better, quicker and cheaper way to go about things.

Disputes are always going to happen. We do not get it right all of the time. We should look for ways to resolve disputes as early as possible, in order not only to get the right provision/placement for the child, but also to maintain relationships between the parents, school and LA. Parents need to feel that they are being listened to and, crucially, that they are being listened to properly, and not just as part of a box-ticking exercise.

Conclusion

As I said, common sense and the law do not always go together. We may not have the perfect SEN system. Parents will always want what is best for their

It is important to remember that the law can be interpreted in many different ways

individual child whereas LAs will have to only consider what is adequate to meet their needs. Therein lies the tension. However, although there is a potential dispute, at the end of the day, parents often just want to feel that their views are being taken account of. When they do not feel that this is the case, they are more likely to appeal. Whilst a tribunal panel may eventually refuse an appeal, my experience is that parents will often feel that they have at least had a fair hearing.

Despite some of the things that I have said, our SEN system is still probably the best system that anybody has come up with so far. I am constantly reminding my children to see what they have got, not what they have not, and I think that we should also be prepared to do the same. So why, rather than wasting time and money trying to come up with a new SEN framework, do we not just try and improve on the one we have already got? **SEN**

Further information

Douglas Silas is Principal Solicitor at Douglas Silas Solicitors:
www.SpecialEducationalNeeds.co.uk